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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

GO-BART IMPORTING CO., PHILIP D. GOWEN and WILLIAM BARTELS,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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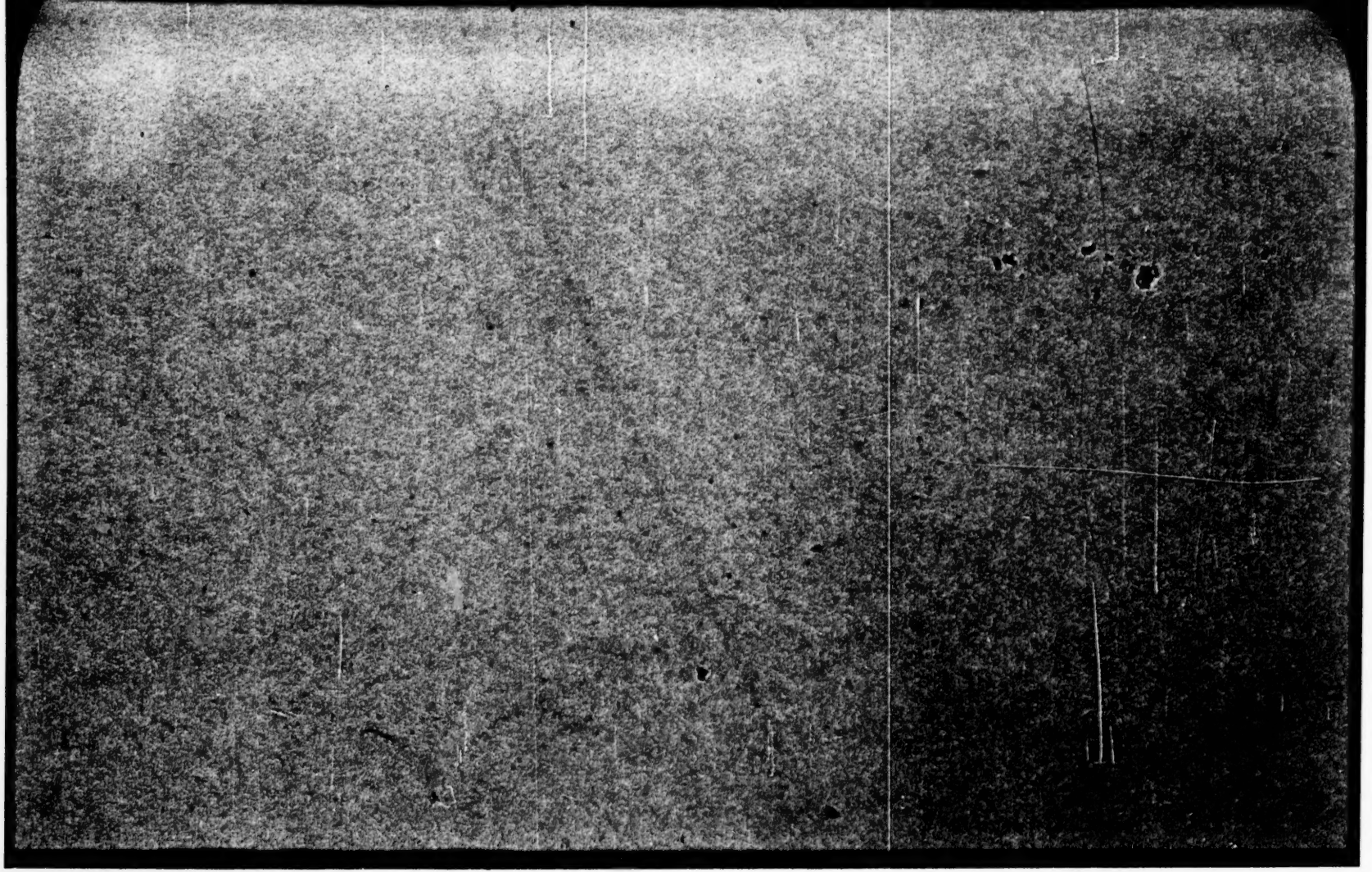

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against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Go-Bart Importing Co., Philip D. Gowen and William Bartels, respectfully submit their petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled proceeding.

History of Case.

Petitioners commenced a proceeding in the United States District Court for the Southern District of New

York seeking an order directing the United States to restore to them documents and papers claimed to have been illegally seized by prohibition agents, and for the suppression of such property as evidence. The application was denied by an order of Hon. Alfred C. Coxe, District Judge (fols. 290-296). From this order an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit. Cf. *Cogen* v. *United States*, 278 U. S. 221, 225. The Circuit Court of Appeals affirmed the order of the District Court. The opinion of the Circuit Court of Appeals was written by Hon. Thomas W. Swan, Circuit Judge. This petition is filed to obtain review of the decision of the Circuit Court of Appeals.

Statement of Facts.

On June 5, 1929, a prohibition agent, William J. Calhoun, swore to a complaint before United States Commissioner Cotter of the Southern District of New York, charging that the petitioners Gowen and Bartels and other named persons "did * * * conspire * * * to commit a nuisance against the United States * * * in violation of the National Prohibition Act." The overt act alleged was the purchase of a Peerless automobile (fols. 88-96).

The complaint was made entirely upon information and belief. The sources of the information and the grounds of belief were not stated.

The complaint, it is now conceded, was insufficient and totally invalid (fols. 253-254). Cf. *In re Rule of Court*, Fed. Cas. 12, 126.

Commissioner Cotter, nevertheless, thereupon issued a warrant for the arrest of petitioners Gowen and Bar-

tels, and the other individuals named in the complaint. The warrant was directed to the United States Marshal or any of his deputies (fols. 82-87).

The following day, June 6, 1929, Eugene R. O'Brien, prohibition agent and a subordinate of Calhoun, and two other prohibition agents, went to the office of the petitioner Go-Bart Importing Co., suite 1030, at 200 Fifth Avenue, New York, bearing a certified copy of the warrant of arrest (fols. 137, 142, 143).

Agent O'Brien and the other agents were not accompanied by the United States Marshal or any of his deputies (fol. 67).

Petitioner Bartels, secretary of the Go-Bart Co., and George Heath, an employee, were in the office of the Go-Bart Co. at the time of the entry of the agents (fol. 59).

The agents entered the premises of the Go-Bart Co., were requested to state their business, and thereupon exhibited a document claimed to be a search warrant and to authorize a search of the premises (fols. 60-61).

The agents then proceeded to ransack the premises (fol. 37). While they were doing this, petitioner Gowen entered the premises.

Agent O'Brien said to Gowen that he (O'Brien) had a warrant for Gowen's arrest and a warrant to search the premises, and exhibited to Gowen a paper claimed to be a search warrant and to authorize a search. The agents took from Gowen's person some keys and under threat of breaking into his desk and safe and forced Gowen to open them. The desk and safe were then searched and from them the agents took papers, documents and property, including journals, insurance policies, cancelled checks, index cards and other miscellaneous property. The agents rummaged at will through

two other desks belonging to the Go-Bart Co., taking therefrom papers and documents of the same nature (fols. 14-15, 61-62). No receipts were given for the articles taken (fol. 62).

Petitioner Bartels, Heath and another employee of the Go-Bart Co., one Gardiner, were arrested after the search, say petitioners (fol. 62); before the search, say the agents (fol. 147).

Thereafter petitioners were arraigned before Commissioner Cotter on a complaint of conspiracy to violate the National Prohibition Act (fol. 63). There has been no hearing on this complaint (fol. 277). So far as the record discloses there has been no indictment.

This proceeding was brought to obtain return of the papers and documents seized as above set forth, and to suppress use of them in evidence.

When this proceeding was commenced the agents attempted to justify their procedure by asserting that one Braidwood, an informer and an alleged accomplice of petitioners, not a Government employee, had told Agent Calhoun, who had in turn told Agent O'Brien, that petitioners had from their offices at 200 Fifth Avenue bought and sold liquor in violation of the National Prohibition Act during the preceding eighteen months (fols. 127-139; cf. fols. 97-126). An elaborate affidavit was submitted by Braidwood in this proceeding alleging facts tending to show petitioners guilty of such crime (fols. 97-126). It is also stated by Agent Calhoun that he independently investigated Braidwood's information and found it to be true, but that "the sources of these independent investigations conducted by deponent cannot be disclosed consistently with public justice" (fols. 130-131).

The agents, in their opposing affidavits, falsely and perjuriously attempted to deny that they had conducted the search upon the assumed authority of the warrant (fol. 146).

Judge Coxe held this denial false in the following language (fols. 254-256):

> "Indeed, it is insisted by the Government that no use was made of the warrant at the time of the arrest, and that Agent O'Brien only took the papers with him 'for the purpose of reference as to the addresses of the various defendants.' This, however, is contradicted by the defendants Gowen and Bartels, who state in their moving affidavits that Agent O'Brien described the papers to them at the time of the arrest as 'search warrants,' and exhibited them to justify the demand for a search of the offices. On that issue, I am inclined to accept the story of the defendants, as I do not think it is at all reasonable to suppose that the prohibition agents did not make some use of the warrant when challenged to show the authority under which they were proceeding in making the arrests. And I am satisfied they were challenged to show their authority, as arrests and seizures of the kind described in these papers are not ordinarily made without some demand for credentials."

Judge Coxe, however, denied the relief sought on the ground that the agents had reasonable cause to believe petitioners guilty of a felony; that the arrest was therefore lawful; and that the search was valid as an incident to such arrest.

But Judge Coxe said (fols. 263-264):

> **"In disposing of this motion as above indicated, I do not wish to be understood as approv-**

ing the practice followed by the Government in making these arrests. I can see no adequate reason why arrests of this kind should not be made by the United States Marshal under valid warrants issued in advance, and I think it would be most unfortunate if any other practice should be generally followed."

The order entered on Judge Coxe's decision was affirmed by the Circuit Court of Appeals.

Questions Presented.

1. In the light of the officers' wanton disregard of orderly procedure, was the arrest valid?

The decision that the arrest was valid is, it is believed, in conflict with the opinion of this Court in *Carroll* v. *United States*, 267 U. S. 132, with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Henderson* v. *United States*, 12 Fed (2d) 528, and with the decision of the District Court for Northern Illinois in *United States* v. *McHie*, 194 Fed. 894.

2. Under any circumstances, is the ransacking of desks and safes in a general and exploratory search for incriminatory papers justifiable as an incident to an arrest?

The upholding of the search and seizure in this is, it is believed, in conflict with the decision of this Court in *Boyd* v. *United States*, 116 U. S. 616.

Reasons for Granting the Petition.

It is respectfully submitted that the Court below erred in its determination of the questions stated above, and

that the effect of its decision is to sanction methods of enforcement historically repugnant to the Constitution.

In this case the agents have made a sorry record. The insufficient complaint, the disregard of the United States Marshal in the execution of the warrant, the cunning and high-handed search, the threats of force to compel the opening of locked containers, and the attempt to lie their way out, present a spectacle which cannot, it is respectfully submitted be reconciled with enforcement of the spirit of the Fourth Amendment.

To disregard orderly procedure and summarily arrest persons sitting peaceably in their offices upon the word of an accomplice and informer, uncorroborated so far as the record discloses, is in effect to violate the Amendment.

And, so far as our examination of the books discloses, *this is the first case that has ever sanctioned a general and exploratory search for incriminating papers as an incident to arrest or otherwise.*

The case, it is submitted, calls for an application of the rule announced in *Boyd* v. *United States*, 116 U. S. 616, 635: "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

And repeated in *Byars* v. *United States*, 273 U. S. 28, 33-34:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may

seem to escape the challenge of illegality but which, in reality strike at the substance of constitutional right."

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the case to this Court for review and determination, as provided by Section 240(a) of the Judicial Code, and that your petitioners may have such other and further relief in the premises as this Court may deem proper.

CHARLES DICKERMAN WILLIAMS,
J. EDWARD LUMBARD, JR.,
SEYMOUR B. QUEL,
Counsel for Petitioners.

New York City, N. Y., May, 1930.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1929.

GO-BART IMPORTING CO., PHILIP D. GOWEN and WILLIAM BARTELS, Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

Neither the opinion of the District Court nor the opinion of the Circuit Court of Appeals have as yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on April 15, 1930. The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Statement.

This is a petition for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, affirming an order denying an application for the return of seized property. The facts have been sufficiently stated in the petition, but will be adverted to from time to time in the brief.

POINT I.

The agents' wanton disregard of orderly procedure in this case invalidates the search and the arrest.

In this case the agents made an insufficient complaint, appropriated a warrant directed to the United States Marshal, ransacked the petitioner's premises upon the false representation that they had a search warrant, and then attempted to justify their procedure by affidavits that were perjurious according to the finding of the District Judge.

There is not a word of evidence in the record to suggest that a summary arrest without submission of the facts to a magistrate was necessary. The agents knew that the petitioners had been doing business at 200 Fifth Avenue for the preceding eighteen months.

Under such circumstances there was no necessity for the action pursued. In *Carroll* v. *United States*, 267 U. S. 132, 156, the Court said:

> "Such a rule fulfills the guaranty of the Fourth Amendment. *In cases where the securing of a warrant is reasonably practicable it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant the seizing officer acts unlawfully and at his peril unless he can show the probable cause."

It is true that the Court was here speaking of search warrants; but no reason appears why the same doctrine should not apply to arrests. The Fourth Amendment relates to both, and the Court in the *Carroll* case later

intimated that the rule does also apply to arrests. Thus the Court said further (267 U. S. 157):

> "The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law 193), while the reason for arrest without warrant on a reliable report of felony was because the public safety and due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant."

Certainly no such reason existed in this case.

In *Henderson* v. *United States*, 12 Fed. (2d) 528, the Circuit Court of Appeals for the Fourth Circuit held that where securing of a warrant to arrest was reasonably practicable it must be done, and that an arrest and search executed without a warrant under such circumstances were invalid.

In that case an informer bought from Henderson a quantity of cocaine. The purchase had been arranged by agents, who were then waiting a short distance from defendant's premises. When the purchase was completed the informers came to the agents and reported what had happened.

> "The officers thereupon accompanied the informers to the store and admission was gained by the informers. The officers went into the store with them and notified the defendant that they were going to place him under arrest for the illegal sale of narcotics."

The informers identified Henderson and the agents demanded the right to search. This was refused. The

agents placed Henderson in custody and searched the premises, finding a can of cocaine and marked money. The Court of Appeals held the search unlawful and reversed Henderson's conviction for error in admitting in evidence the can of cocaine discovered at the time. The Court said:

> "It is admitted that the Government officers had no warrant either for the arrest of the defendant or for the search of his premises. There is no showing or contention that it was necessary to arrest defendant without a warrant to prevent his escape * * *."
>
> "It is argued that the officers had probable cause to believe that defendant had committed a felony and that they were therefore justified in arresting him without a warrant and in searching his premises as an incident to his lawful arrest."

The Court held that the search was the main object of the officers' conduct and proceeded to say:

> "The officers could not do indirectly what they could not do directly and certainly they could not nullify a constitutional provision against unreasonable searches and the Act of Congress making it a crime to search a private dwelling without warrant by the simple expedient of placing the defendant under arrest. The great bulwark of individual liberty incorporated in the Fourth Amendment would be but a mockery if petty officers of the Government were at liberty to disregard its provisions whenever, to procure evidence, they might see fit to arrest without a warrant upon a belief that a felony had been committed * * *. Can it be the law that an officer for the purpose of seeking evidence may invade the home of a citizen and search it without the oath or affirmation required by the Con-

> stitution and without having the question of probable cause determined by a judicial officer; upon merely deciding for himself that there is probable cause to believe that some person within the home is guilty of a felonious violation of a Revenue Act?"

A case in which the facts disclose a remarkable similarity to the present case is *United States* v. *McHie*, 194 Fed. 894.

In this case the defendants had been engaged in running an alleged bucket shop in alleged violation of Section 215 of the Criminal Code, a statute which provides that the use of the mails in a scheme to defraud shall be a felony. A special agent made a complaint alleging the existence of the scheme to defraud before a United States Commissioner, who thereupon issued a warrant for the arrest of the defendants. The agents, without securing the presence of any marshal or deputy marshal, or any persons authorized to serve a warrant or make a seizure, went to the premises of the defendants for the purpose of arresting the defendants and seizing the incriminating evidence. This was done and a large mass of books, papers, documents and other property was seized. Thereafter the defendants petitioned for a return of the property so seized and the petition was granted by the Court.

> "It would be exceedingly difficult under any circumstances to sustain the wholesale seizure and destruction of property shown in this case. The officers of the Government, deriving their authority from the Department of Justice, acted in a most unjust and unnecessarily lawless manner. Under no circumstances had they power to cut telegraph wires or break open a safe or vault. Nothing but a special order showing such

> a seizure as made it necessary to destroy property could have authorized it * * *. An arrest having been made without warrant because of the absence of a marshal or deputy, the seizures were unlawful on this ground * * *. It is, however, sought to justify the seizure on the ground that the persons arrested were found actually in the perpetration of a crime and could be arrested without warrant under the Illinois statute; and thus, the arrest being lawful, the seizure was also valid under the Dillon and Mills cases. *It is sufficient to say, in answer to this position, that the seizure was unreasonable, no matter what technical power may have been behind it.* Moreover, it would be a most surprising extension of the law of arrest without warrant, to justify the seizure of peaceful persons sitting quietly in their offices, on the ground that they were carrying on some business made criminal by such statute, or had formerly committed such an offense * * *. Such a doctrine has no foundation, either in reason or necessity, and is utterly opposed to the Fourth Amendment to the Constitution."

The rule permitting the arrest by private persons of those reasonably suspected of felony had its foundation in the days of summary execution and the rule of infangthief (1 *Stephen, History of Criminal Law*, 61), when the felon was an outlaw to be killed at sight.

At the present time Congress has set up magistrates to determine the existence of probable cause and marshals to execute warrants. The Courts have further held that it is not sufficient for an officer to make an affidavit that he has reason to believe and does believe that a certain defendant has violated a law. He must give the sources of his information.

Thus Mr. Justice Bradley of this Court said in *In re Rule of Court*, Fed. Cas. 12126:

> "I am informed by * * * the district judge * * * that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced * * * whereby much useless expense is caused to the government and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who upon the relation of others whose names are not disclosed, swears that, upon information he has reason to believe, and does believe, the person charged has committed the offense charged. * * * After an examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the fourth article of the amendments, declares that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation describing the place to be searched and the persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that *the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground for believing the accused person guilty;* and this ground must amount to a probable cause of belief or suspicion

> of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

This rule would be entirely avoided if the procedure followed in the present case is proper. And it is submitted, in the light of the *Carroll*, *Henderson* and *McHie* cases, that it is improper unless some emergency exists.

In this case petitioners were quietly in their offices. There was no reason to apprehend any difficulty in the execution of a warrant. The agents knew, as well as they knew anything about petitioners, that they had been occupying the same offices for the preceding eighteen months (fols. 97-126). There was no excuse for the failure to proceed in an orderly manner.

The District Judge disapproved the course pursued by the officers in this case, and stated that it would be most unfortunate should the practice be generally followed.

It is submitted that such disapproval will not be effective unless enforced by the rejection of evidence so secured.

POINT II.

The arrest of petitioners did not authorize a general exploratory search for incriminatory papers or the extortion of keys by threats of force for the purpose of searching locked desks and safes.

The Court of Appeals and the Government have relied principally on the case of *Marron* v. *United States*, 275 U. S. 192, as authority for holding that the general and exploratory search of petitioners' premises, the procuring the opening of locked desks and safes under threats of force, the search for and seizure of papers in these receptacles, to be lawful as an incident to the arrest of petitioners Gowen and Bartels.

The distinction which we desire to make between this case and the *Marron* case cannot be better expressed than in the following quotation from the brief submitted by the Government in opposition to Marron's petition for certiorari to the Circuit Court of Appeals for the Ninth Circuit. The purpose of the quoted matter was to distinguish between the *Marron* case and the case of *United States* v. *Kirschenblatt*, 16 Fed. (2d) 202. It is submitted that precisely the same distinction which was drawn in this quotation between the *Kirschenblatt* case and the *Marron* case also distinguishes the *Marron* case and this case. The quotation referred to is as follows (quoted from pages 10, 11 and 12 of Brief in Opposition, *Marron* v. *United States*) (italics are as in the original quotation; heavy black type is supplied by authors of present brief):

> "In that case (referring to the *Kirschenblatt* case, 16 Fed. [2d] 202) the record showed that

the agents ransacked defendant's entire premises and rummaged all through his private papers for incriminating evidence, for in the course of its opinion the Circuit Court of Appeals said (p. 203):

> 'While we agree that strict consistency might give to a search of the premises, incidental to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed. Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, *from ransacking his house for everything which may incriminate him,* once you have gained lawful entry, either by means of a search warrant or by his consent. * * *
>
> 'After arresting a man in his house, *to rummage at will among his papers in search of whatever will convict him,* appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate.'

"After pointing out that papers necessary to a criminal venture may be seized, the court proceeded (p. 204):

> 'Yet, if all records of the offender's doings, such as account books or customers' lists, are to be included, there would seem to be no escape from allowing a search at large through all his papers.
>
> 'It is seldom that one finds a document containing evidence of crime which was not at one time used in its commission; the papers important in any prosecution are ordinarily

> either communications passing between the actors or records necessary to keep track of the details. These are all that the prosecution requires, and all that, except in rare instances, it will ever get. They cannot be reached, *except by a thorough search of all that the offender has,* to allow which would be to countenance exactly what the amendment was designed to prevent. * * *
>
> 'The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant.'

"There are statements in that opinion which indicate that the court believed that the only incriminating papers (not contraband or instruments of the crime) which may be seized as incident to a lawful arrest are those found on the person of the man arrested, **but the record in that case showed that to disclose the incriminating documents the officers ransacked the premises in a high-handed way, not to discover contraband articles described in the warrant but merely to obtain incriminating documents, and it was for this reason that the United States made no application for certiorari to review that decision.**

"There was in the instant case no rummaging among defendant's papers for incriminating evidence.

> "Whether a search and seizure are reasonable must depend upon the facts in each particular case. At the time of the seizure in the instant case the officers were engaged in the execution of a valid warrant directing the search of the premises for intoxicating liquor and property designed for its manufacture. They had no warrant for the seizure of papers *nor was any general search made therefor.* The documents seized were *incidentally discovered* while the officers were searching for liquor."

And in its brief on argument the Government pursued the same distinction. For instance it presented with some emphasis the case of *State* v. *Mausert*, 88 N. J. L. 286. In this case the hotel register of an alleged disorderly house had been seized at the time of an arrest. The seizure was sustained but the Court said:

> *"It is not a case where papers were secreted and intended to be kept private* nor of requiring the production of papers of like character, but rather the taking of evidence of a crime then being committed, in the commission of which the books were a useful element. There was no unreasonable search and seizure within the constitutional prohibition."

The general search that took place in the *Kirschenblatt* case, so aptly described by the Government in the brief quoted from, is precisely what took place in this case, plus the aggravated features of the lack of a warrant, the deceitful claim of possession of a search warrant, the threat of force to obtain the opening of desks and safes, and the making of false affidavits to sustain the seizure.

It is submitted that there is nothing in the opinion of the *Marron* case to indicate that the Court intended to overrule the celebrated case of *Boyd* v. *United States*, 116 U. S. 616, and that the general and exploratory search for incriminating papers undertaken in this case cannot be reconciled with the doctrine of the *Boyd* case. The *Boyd* case interpreted the Fourth Amendment as forbidding *general* searches for incriminating papers *under any circumstances*. The Court said:

> "The search for and seizure of stolen or forfeited goods or goods liable to duties and concealed to avoid the payment thereof are totally different things *from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.* The two things differ *toto coelo*. In the one case, the Government is entitled to the possession of the property, in the other it is not. * * *
>
> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history or the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book'; since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was

> perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' "

The Court then discussed with the greatest approval and praise the case of *Entick* v. *Carrington*, 19 Howell St. Tr. 1029.

The Court stated that abuses at that time had crept into the administration of public affairs, and continued:

> "Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. * * * By authority of the secretary's warrant Wilkes' house was searched, and his papers were **indiscriminately** seized."

The Court then quoted from Lord Camden's opinion in *Entick* v. *Carrington*, as follows:

> "The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my *Lord* Coke denied its legality (4 Inst. 176) and, therefore, if the two cases (the search for stolen goods and the search for incriminatory papers) resemble each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, *which was never yet allowed from all antiquity*. Observe, too, the caution with which the law proceeds in this singular case (search for stolen goods). There must be a full charge upon oath of a theft committed. The

owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description. * * *

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case (case of search for papers) protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy, my answer is that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing * * *.

"Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. * * * In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. *But our law has provided* ***no paper search*** *in these cases to help forward the conviction* * * *."

The Court declared that the case of *Entick* v. *Carrington,* was a landmark of English liberty and that it had been the intention of the First Congress to write the principles of this case into the Constitution. The Court concluded *that general searches for papers were forbidden.*

The doctrine of the *Boyd* case has been often approved by this Court and has been followed in a series of cases. *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298. In *Carroll* v. *United States,* 267 U. S. 132, the Court quoted the passage from the *Boyd* case relating to the distinction between the search for stolen goods and the search for papers that has been set forth above, and described the passage as one of "particular significance" (*267* U. S. 149).

Can this historic policy against general and exploratory searches and seizures for incriminating documents said to be subject to the proviso that if an informer and accomplice tells an officer that certain persons are violating the law, and this officer tells another, the latter may proceed to a general and exploratory search of the alleged offenders' premises and papers whenever he may find them at home?

As the Court said in the *Kirschenblatt* case:

> "After arresting a man in his house, to rummage at will through his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home."

The general search as incident to an arrest is also subject to the same criticisms that Otis made against general warrants:

1. It may be made by a private person.

2. There is no return.

1. In his argument to the Justices of the Superior Court of the Province of Massachusetts Bay in *Paxton's Case*,* in February, 1761 (which is referred to in the *Boyd* case, 116 U. S. 625), Otis said in part (2, Works of John Adams, 524):

> "But to show another absurdity in this writ; if it should be established, I insist upon it, every person by the 14 Charles II† has this power as well as custom-house officers. The words are, 'It shall be lawful for any person or persons authorized,' etc. What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask for it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and blood."

Thus, if decision sought to be reviewed be correct, any man can explore his neighbor's house, provided someone will tell him, that someone else told him, that the neighbor has violated the liquor laws (practically all liquor law offenses now being punishable by prison terms in excess of one year).

The possibilities of such a rule are extraordinary.

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* Paxton was Surveyor of the Port of Boston. He applied for a writ of assistance. A group of Boston merchants were allowed to intervene, and oppose, by counsel, the issuance of the writ.

† The statute authorizing writs of assistance.

2. In the same argument Otis said (2, Works of John Adams, 524-525):

> "Again these writs are not returned. Writs in their nature are temporary things. When the purposes for which they are issued are answered, they exist no more; but these live forever; no one can be called to again."

In this case a great mass of papers were taken from petitioners. There has been no return on any writ, because none was issued. No receipt was given. The safeguards thrown about search warrants by Congress do not exist as to these cases.

These conclusions seem unavoidable:

1. The Fourth Amendment was intended to forbid general exploratory searches for incriminatory papers under any circumstances.

2. The effect of the decision below will be to permit general exploratory searches for incriminatory documents by private persons who have hearsay information that the person whose premises are to be searched has violated the liquor laws, when that person is at home.

We have already quoted the elaborate statement made by the Government in the *Marron* case in arguing that that case did not involve a *general* search for incriminatory papers, and stating that no application had been made to review the *Kirschenblatt* case because the latter *had involved a general search for incriminatory papers.* That this Court appreciated the distinction is indicated by its statement in the *Marron* opinion:

"General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them" (275 U. S. 195). Furthermore the cases cited by this Court in that part of its opinion sustaining the seizure in that case were the *Kirschenblatt* case itself; *Kirvin* v. *United States*, 5 Fed. (2d) 282, another case in which the Second Circuit Court of Appeals declared that no general search for papers could be made as an incident to an arrest; and *Sayers* v. *United States*, 2 Fed. (2d) 146, a Ninth Circuit Court of Appeals case sustaining a seizure of liquor.

Hence it is submitted that the *Marron* case does not require that the second proposition above stated be accepted, and that the seizure in this case, under the doctrine of the *Boyd* case, was unconstitutional.

It is submitted that the decision of the lower courts in this case is an encroachment on the right of the citizen guaranteed by the Fourth Amendment, the kind of encroachment warned against in the *Boyd* and *Byars* cases, and that the decision of the Court below should be reviewed and reversed.

POINT III.

The writ of certiorari should issue.

Respectfully submitted,

CHARLES DICKERMAN WILLIAMS,
J. EDWARD LUMBARD, JR.,
SEYMOUR B. QUEL,
Counsel for Petitioners.

New York City, N. Y., May, 1930.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 111

GO-BART IMPORTING COMPANY, INC., PHILIP D. GOWEN, AND WILLIAM BARTELS, PETITIONERS,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE.

E. F. COLLADAY,
Attorney for Petitioners.

J. EDWARD LUMBARD,
Of Counsel.

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Now come the petitioners, by their attorney, and, by leave of court first had and obtained, file this memo-